

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT TROHA and FREDERICK	:	
BIGNALL,	:	
Plaintiffs	:	
	:	
v.	:	Case No. 1:05-cv-00191-SJM
	:	
THE UNITED STATES OF AMERICA	:	
and RAILS-TO-TRAILS	:	
CONSERVANCY,	:	
Defendants	:	

Hearing in the above-captioned matter held
on Thursday, March 15, 2007, commencing at 1:30
p.m., before the Honorable Sean J. McLaughlin,
at the United States Courthouse, Courtroom C, 17
South Park Row, Erie, Pennsylvania 16501.

Reported by Janis L. Ferguson, RPR, CRR
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I N D E X

Transcript of Proceedings 3

1 THE COURT: This is the time that we have set for
2 argument on various motions filed in Troha versus United
3 States, at Civil Action No. 05-191-Erie. And would everyone
4 be so kind as to identify themselves and their client for
5 the benefit of my court reporter. Starting over here.

6 MS. TARDIFF: Good afternoon, Your Honor. Kris
7 Tardiff for the United States.

8 MR. SEMINS: Your Honor, good morning. Bill
9 Semins on behalf of Rails-to-Trails.

10 THE COURT: Was that Semins? I'm sorry.

11 MR. SEMINS: Semins.

12 MS. FERSTER: Andrea Ferster, general counsel for
13 Rails-to-Trails Conservancy.

14 MR. COHEN: Good afternoon, Your Honor. David
15 Cohen for the Plaintiffs. And with me is Mr. Troha, the
16 Plaintiff.

17 THE COURT: Nice to see you, sir.

18 MR. COHEN: And his wife.

19 THE COURT: Nice to see you, ma'am. Everybody
20 came some distance today, I guess.

21 Well, we have a lot to cover here today. And
22 let me preface our discussion by saying I have had an
23 opportunity to review these briefs and cases in some detail,
24 so I think I have -- at least a good working knowledge of
25 each side's position.

1 And just as a matter of -- just as an aside,
2 it may be of some passing interest, although not really
3 material to anything, to know that in the almost 13 years
4 I've been on the bench, until the last seven or eight
5 months, I never had a rail banking case, and all of a sudden
6 I have two that have been briefed and are in various stages
7 of development. So we've had an opportunity to immerse
8 ourselves in this area of law.

9 I think, if memory serves, Mr. Cohen, you
10 would have filed your motion first. Is that right?

11 MR. COHEN: Yes, Your Honor.

12 THE COURT: Well, since it doesn't really much
13 matter, but sometimes first is the way to do it, why don't
14 you come on up, and let's have a discussion about the issues
15 that are raised in your brief, and then I'm going to be
16 happy to hear from the other side.

17 MR. COHEN: Thank you, Your Honor. May it please
18 the Court, my name is David Cohen, and I represent the
19 Plaintiffs in this case.

20 As Your Honor has indicated, the Court is
21 familiar with the -- the facts of the case, so I won't
22 belabor that.

23 THE COURT: Let's begin our discussion this way:
24 And I have a tendency to ask a lot of questions, and
25 sometimes I'm concerned that people don't get a chance to

1 tell me what they want, but I am always going to give you an
2 opportunity to do that, either by way of direct answering my
3 question or at the end. So let's rise above the trees,
4 first of all, and look down at this thing.

5 As I understand it, the genesis, if you will,
6 of this controversy -- and most of the taking controversy --
7 controversies involving the Rail Banking Act involve
8 comments made by Justice O'Connor in a concurring opinion in
9 the Preseault United States Supreme Court case. And in that
10 case, the Justice essentially opined that -- or left open
11 the door for a takings claim.

12 And it's your position in this case, as I
13 understand it, that but for the operation of the -- and I'm
14 just going to refer to it loosely as the rail banking law.
15 But for the operation of that law and all of its
16 particulars, including the federal impact that it may have
17 on abandonment, that but for the operation of that act, the
18 property interests, the reversionary property interests
19 enjoyed by your clients along this 18.9-mile stretch of rail
20 would have reverted under -- under Pennsylvania law. And
21 since the reversion was, quote, stopped, if you will, or
22 prevented by virtue of this Act, a takings claim under the
23 Fifth Amendment arises.

24 That's your essential position. Is that
25 correct?

1 MR. COHEN: I think that's fair to say, Your
2 Honor, yes.

3 THE COURT: All right. There are so many places
4 we could begin our discussion, but if I can lay my hand --
5 just bear with me a second.

6 Now, a large portion of your brief was
7 directed at the question of abandonment. And, of course, it
8 strikes me that if, in fact, there had been an abandonment
9 of the railroad line by A & E, that is one way -- that is
10 one way that the property could have reverted to the
11 property owners.

12 Alternatively, though, tell me if this is
13 true: Isn't the concept of a -- and I'm going to use this
14 term very loosely -- a nonconforming use, if you will, a use
15 of the easement now for something that exceeded the original
16 purposes, that's an independent way, isn't it, for the same
17 purpose to be accomplished?

18 MR. COHEN: That is correct, Your Honor. I --

19 THE COURT: Although you didn't push it that much
20 in your brief, the other side joined issue on the question
21 of public use and shifting use. And that's a distinct
22 issue, isn't it?

23 MR. COHEN: Yes, Your Honor. I think it's
24 important for the Court to look at the actual deeds and
25 condemnation documents that are at issue in this case.

1 THE COURT: Let's start there. And then I'm going
2 to -- I want to -- we'll talk about that, and then I want to
3 begin my discussion with you with a rather in-depth
4 discussion of Buffalo II, and I want to get your reaction to
5 Buffalo II.

6 Now, first of all, I assume for purposes of
7 our discussion, you would concede that any of the fee simple
8 absolutes, they are off the table.

9 MR. COHEN: Yes, Your Honor. And the Plaintiffs
10 have stipulated to that.

11 THE COURT: Yes. Now, we then are left with a
12 number of -- a number of easements that appear to be --
13 appear to be characterized as follows: Some are easements
14 for railroad purpose. Is that correct?

15 MR. COHEN: I believe, Your Honor, that they are
16 all easements for railroad purposes.

17 THE COURT: All right. Is it of any legal moment,
18 in terms of your position here, if they are all
19 characterized as easements for railroad purpose, or only
20 some are characterized that way, and others are
21 characterized as determinable easements?

22 MR. COHEN: It would depend on the nature of the
23 language in the fee simple determinable -- for example, the
24 Halsey deed, which I believe is Exhibit 19, is -- the
25 parties stipulated to certain deed categories. And that is

1 a deed under Category II, a deed -- warranty deeds with "so
2 long as" language.

3 And in that instance, Your Honor, if you look
4 at that deed, there's actually language in the deed -- and I
5 didn't point this out in the brief.

6 But it's apparent, if you look at the deed,
7 that there was language that was handwritten by the grantor
8 that states in the granting clause where he grants the land
9 to the -- it was the Sunbury & Erie Railroad Company, a
10 strip of land for rods and width, as long as the same is
11 used as a railroad. And when not so used, to revert back to
12 Halsey, his heirs, or assigneds.

13 THE COURT: Now, maybe the way to sharpen the
14 focus is as between you as the Defendants, you have agreed,
15 have you not -- or maybe you haven't -- on the legal nature
16 of some of these easements?

17 MR. COHEN: Well, we've agreed -- we have agreed,
18 first of all, that certain deeds are conveyed fee simple
19 title to the railroad. So those are not part of the case.

20 THE COURT: All right.

21 MR. COHEN: The remaining deeds, we have
22 categorized them. The parties --

23 THE COURT: Some are warranty deeds.

24 MR. COHEN: Right. Some are warranty deeds. We
25 have -- we have a good portion of the corridor, Your Honor,

1 what was condemned by the railroad --

2 THE COURT: So some of these easements were given
3 birth in a warranty deed. Some were as a result of
4 condemnation proceedings.

5 MR. COHEN: Right.

6 THE COURT: Some were, according to you, easements
7 for railroad purposes and railroad purposes only. Have I
8 missed another broad category of deed?

9 MR. COHEN: There are grant deeds with release
10 language. And then also we have a good part of the corridor
11 that -- where there are no conveyancing instruments; where
12 essentially the railroad acquired the property by adverse
13 possession.

14 THE COURT: All right. Well, did that adverse
15 possession, then, ripen into a fee simple absolute?

16 MR. COHEN: No. Under Pennsylvania law, I
17 believe, Your Honor, it's fairly clear that if the railroad
18 takes property -- well, it would depend, again, on the
19 Charter or the Act. Here it would be under the Railroad Act
20 of 1849. And there's cases -- we have cited them -- that
21 stand for the proposition that the railroad could only
22 obtain that which it could obtain under the charter by
23 condemnation.

24 So it's the equivalent of condemnation,
25 except we don't have the condemnation proceedings like we do

1 in two of these instances, where the condemnation
2 proceedings actually talk about what the Board of Viewers
3 valued the property for, which was for railroad purposes.

4 THE COURT: All right. And so tell me if this is
5 right: As part of my charge in resolving this case, and
6 perhaps in every takings claim, where there is a collision,
7 if you will, between the interests being served by the
8 railroad -- Rail Banking Act and the private property
9 owner's interests, it's necessary for the Court to go back
10 to the original deed instruments. Is that correct?

11 MR. COHEN: Absolutely, Your Honor.

12 THE COURT: All right.

13 MR. COHEN: I believe that's the case. And I
14 believe if you look at the fairly recent decision of the
15 Federal Circuit in the Thaves case --

16 THE COURT: Because you have to figure out, as
17 best as one can, I suppose, what interests were, in fact,
18 being conveyed.

19 MR. COHEN: That's right, Your Honor. Ultimately
20 this goes back to what did the grantor grant to the
21 railroad. Because the railroad cannot convey interest it
22 does not have.

23 THE COURT: Now, let's talk -- we're going to talk
24 about Buffalo Township II. And, to me, there are -- first
25 of all, let's talk about Buffalo Township II. Insofar as

1 that case may impact on your abandonment issue -- on your
2 abandonment claim, Buffalo Township is problematic for you
3 in that regard, isn't it?

4 MR. COHEN: Well, it's distinguishable.

5 THE COURT: Maybe. But in a perfect world,
6 everybody gets -- every litigant has to take the cases as
7 they come on. In a perfect world, it would be, from the
8 standpoint -- from the standpoint of the Plaintiffs, from
9 the standpoint of the issue of abandonment, your path would
10 be less rocky if Buffalo II didn't exist.

11 MR. COHEN: I certainly would agree with that.

12 THE COURT: All right. How does one distinguish
13 it?

14 MR. COHEN: Well, in Buffalo Township II, first of
15 all, I think you have to take a step back and look at the
16 facts of that case. That was a case where the landowners
17 blockaded the trail, and the Township sought for and
18 obtained --

19 THE COURT: Injunction.

20 MR. COHEN: -- injunction.

21 THE COURT: And they got it.

22 MR. COHEN: Right. They received it.

23 THE COURT: But the blocking of the trail -- the
24 genesis is of less moment to me, because the reason for the
25 blocking of the trail was a claim that the reversionary

1 interests had kicked in, just like here.

2 MR. COHEN: That's -- that's correct. That's
3 correct. In terms of the analysis, though, first the
4 Court -- well, the Trial Court, the Court of Common Pleas,
5 made the finding of fact, which under Pennsylvania law, the
6 question of abandonment is typically for -- for the jury.

7 THE COURT: I was going to ask you about that.
8 There's a long line of authority to that effect.

9 However, apparently in that case, it did not
10 cause the Appellate Courts any undue pause, because they
11 went ahead and decided it anyways.

12 But would you agree -- well, let me put it
13 this way: If there are two components of abandonment under
14 Pennsylvania law, and that is a permanent intention to
15 abandon, coupled with external acts that are reflective of
16 that, would you agree that on undisputed facts, it is
17 appropriate for a Court to take that issue from the jury?

18 MR. COHEN: You mean in this particular case? In
19 a takings case?

20 THE COURT: How about this case?

21 MR. COHEN: Yeah, in this case, we are not
22 entitled --

23 THE COURT: Because you've -- you're not entitled
24 to, and I've got to resolve it as it is. But that having
25 been said, isn't it arguable that the indicia of abandonment

1 or lack of indicia of abandonment in Buffalo II was not
2 dissimilar from what's going on in this case?

3 MR. COHEN: Well, it was similar in the sense that
4 it involved rail banking. And the Court did find --
5 remember, the Trial Court found that Conrail did not have
6 the intent to abandon the corridor based on certain facts
7 before the Court in that case. And --

8 THE COURT: One of them was a reversionary
9 interest that was specifically -- no, a right to re-enter,
10 if you will, that was specifically maintained in the
11 quitclaim deed that was given. And the other one was the
12 very process of negotiation that was going on.

13 MR. COHEN: That's correct. And then on the other
14 side, it -- I believe in favor of abandonment, was the
15 railroad's petitioned to abandon the line before the Surface
16 Transportation Board.

17 THE COURT: All right.

18 MR. COHEN: In this case, though, Your Honor, what
19 we have here -- first of all, I would say in terms of the
20 intent, the railroad's intent to abandon, I think, in this
21 case is stronger on the facts than that in Buffalo II.

22 First of all, you have not just the
23 railroad's application for abandonment with the Surface
24 Transportation Board, but also in its application, it
25 affirmatively states, because there's been no traffic on

1 this line since 2001, no common carrier traffic since 1985.

2 THE COURT: Right.

3 MR. COHEN: That the railroad explicitly stated
4 that there is no alternative to abandonment.

5 So that, I think, is a strong indication of
6 the railroad's intent to abandon because it is not
7 economically feasible for -- for the railroad in any
8 foreseeable future to run freight on that line.

9 THE COURT: Let me ask you this: And I think you
10 make fair points there. Of course, nonuse in and of itself
11 is not sufficient under Pennsylvania law. As a matter of
12 fact, it seems to me Buffalo Township goes out of their way
13 to indicate that no single factor is determinative. That
14 constellation of things.

15 MR. COHEN: Yes, that's correct, Your Honor. And
16 that's why I think the Court does have to take into account
17 the entire constellation of facts.

18 Buffalo II, the Court did go out of its way,
19 I think, to say that in that case, the Trial Court did not
20 error, the Court was not going to disturb the findings of
21 the Trial Court. But in this case, we have several factors
22 both on the actual acts and on the intent that we don't have
23 in Buffalo II.

24 THE COURT: Now, a little bit off the discussion,
25 but we're going to get right back to Buffalo II. Given the

1 present procedural posture of this case, the first thing
2 that once I finally figured out what was going on and
3 assimilated the facts as best as I could, it was a ripeness
4 question for me.

5 And this is why I say that: The rail banking
6 process, whatever its ultimate conclusion may be, has not
7 yet run its course. And the thing that gives me a little
8 pause in this case, putting aside the invitation by the
9 amicus curiae to weigh in on this issue that's never been
10 decided, and that is whether or not the mere issuance of an
11 NITU is significant to trigger a takings claim, but putting
12 that aside, here is my question: Aren't we all potentially
13 tilting at windmills here if it should come to pass that
14 come April 3rd or April 4th, whenever the next extension is
15 that has been -- and there's been multiple extensions over
16 the last three or four years. If the railroad and the WCTRA
17 or whatever the name of the group that stepped into the one
18 County's shoes and the other county, are unable to come to
19 an agreement, well, then the railroad is free to abandon, at
20 which point the STB loses its jurisdiction, and you will
21 then have at that point, it seems to me, conclusively,
22 precisely what you're trying to get now. Aren't we a little
23 early here?

24 MR. COHEN: You know, Your Honor, I -- I share the
25 Court's sentiments on that score.

1 THE COURT: It's almost an Article III
2 justiciability issue.

3 MR. COHEN: Well, here's the procedural quandary
4 that we're in, so to speak, Your Honor: We have a decision
5 from the Federal Circuit, Caldwell versus United States.

6 THE COURT: Right.

7 MR. COHEN: You know, that case prompted the
8 timing of the filing of this suit.

9 THE COURT: All right. In what respect?

10 MR. COHEN: Well, in Caldwell, the Federal Circuit
11 held that the cause of action --

12 THE COURT: Accrues?

13 MR. COHEN: -- accrues when the NITU is issued.
14 It's a bright line. The statute of limitations starts
15 ticking from that date. The Federal Circuit held that
16 that --

17 THE COURT: But what sense does that -- this is
18 why that makes no sense to me: And I'll tell you why.
19 Because in every other instance -- and this is with all
20 respect to the Circuit Court. But in every other instance I
21 can think about where the issue is when does a cause of
22 action accrue, there has been damage contemporaneous with
23 the accrual.

24 Here, you could have a -- what is the statute
25 of limitations, by the way?

1 MR. COHEN: It's six years, Your Honor. And we
2 waited two years, thinking that -- it wasn't as if we filed
3 suit the day after the NITU was issued. We waited two
4 years. Also, I have never seen an instance where they have
5 strung it out -- they have asked for nine extensions --

6 THE COURT: So, actually, what you're doing is
7 this was a pre-emptive move to protect -- to protect a
8 limitations argument against you, isn't it?

9 MR. COHEN: In part, yes. We didn't want to sit
10 on our rights and have -- because there's -- there's been a
11 subsequent ruling by the Federal Circuit reaffirming
12 Caldwell.

13 THE COURT: But that doesn't -- and I'm not
14 quibbling with the theory behind it at all. It seems like
15 reasonable lawyering to me. But it still leaves -- it
16 doesn't address the question, though, does it, whether we
17 have all got our horses out of the barn too soon here;
18 whether there's a general case in controversy yet, does it?

19 MR. COHEN: Well, I certainly understand what the
20 Court is saying. And I do think, for example, if --

21 THE COURT: Because the last chapter has -- the
22 last and most important chapter hasn't been written yet.

23 MR. COHEN: I agree with that, Your Honor. And
24 if, as Your Honor suggested -- one possibility would be that
25 after -- you know, after this last extension -- and by the

1 way, we intend to ask to petition the Surface Transportation
2 Board not to grant any further extensions, and if they
3 cannot reach an agreement, then the need to operate as a
4 notice of abandonment, and my clients would be much happier
5 to actually -- to be able to go in and file a quiet title
6 action in Court of Common Pleas and get the land back.
7 That's what they really want, is the land. Compensation is
8 a poor substitute for that. But that's all that they have
9 under the ruling of Preseault, U.S. Supreme Court finding
10 that this rail banking statute is constitutional --

11 THE COURT: So they really want -- and not just
12 speaking for the lead Plaintiffs here, Troha, but you're
13 saying for your entire class, they are not interested in --
14 in a perfect world, they don't necessarily ever want to see
15 a day where they are sitting in a courtroom on damages.
16 They want the land back. Is that right?

17 MR. COHEN: That's right, Your Honor. A lot of
18 them have been expecting to get this land back. They --
19 they believe that -- you know, that under Pennsylvania law,
20 they are entitled to get it back, and but for the Rail
21 Banking Act, they would have gotten it back.

22 So -- but, again, because of the Caldwell
23 decision, you know, we waited a couple years. And also, you
24 know, the -- you know, many of the landowners are elderly.

25 THE COURT: Yes.

1 MR. COHEN: There's a limit as to how long we can
2 wait.

3 THE COURT: I understand. I take it that -- I
4 take it that there have been no quiet title actions filed in
5 Common Pleas Courts.

6 MR. COHEN: No. No, Your Honor. And I -- and I
7 think it would be almost the equivalent of Rule 11 to file
8 one now. I don't think there's a good-faith basis in the
9 law to file one while this NITU is still in effect.

10 In fact, the landowners have no claim to that
11 property now. They have no claim to possess -- to exclusive
12 possession of the property now. They are in this twilight
13 zone.

14 THE COURT: All right. All you can get on the
15 Federal side here is a takings claim, right? A money damage
16 claim.

17 MR. COHEN: Yes. That is correct.

18 THE COURT: Well, putting aside the ripeness
19 issue, then, I think you and I both recognize the issue --
20 and I'm going to chat with the Defendant about it. Let's
21 resume our discussion, then, of Buffalo Township.

22 The other argument of the Defendant here
23 which they raise in opposition to your contention that a --
24 their -- a taking has occurred is that -- and these two
25 arguments might kind of partake of each other. But one is a

1 shifting public use argument. And the other is, it seems to
2 me, a first cousin of it, but it is that from the get-go,
3 there was inherent in these easements the right,
4 quote/unquote, for the property to evolve into rail banking
5 and/or interim trail use. Similar concepts, but maybe
6 slightly different.

7 Now, what does it say to you -- and before I
8 go right back to Buffalo Township -- that Pennsylvania
9 itself has passed a Rails-to-Trails Act? Isn't that, if
10 nothing else, a rather clear legislative indication that the
11 Pennsylvania legislature espouses a shifting public use
12 doctrine?

13 MR. COHEN: I would disagree with that, Your
14 Honor. I don't -- in fact, many states have State
15 Rails-to-Trails Acts.

16 THE COURT: That mirror the Federal Act?

17 MR. COHEN: That mirror the Federal Act. And, in
18 fact, the Federal Circuit has opined on that both in the
19 Preseault II case and, most recently, in the Thaves case.
20 And in both instances, the Federal Circuit held that State
21 action cannot deflect the -- cannot deflect from the Federal
22 Government's responsibility for a taking under the Fifth
23 Amendment.

24 In terms of -- but to answer the Court's
25 question directly, does the fact that Pennsylvania has a

1 State Rails-to-Trails statute suggest that there is a
2 shifting public use, I -- I disagree with that conclusion,
3 because there's nothing inherent in the fact of a -- of a
4 State Rails-to-Trails Act that suggests that the
5 Pennsylvania legislature has decided to reinterpret deeds in
6 a way that radically departs from traditional concepts of
7 property law that have been adhered to by the Courts of the
8 Commonwealth for the past 200 years.

9 THE COURT: But would I be reading Buffalo
10 Township for more than it's worth when -- well, first, let
11 me just quote a few sentences from the opinion, and then we
12 can talk about it more intelligently.

13 The Court says here at Page 659 of the
14 Atlantic 2d. site, "Both the National Act and the State Act
15 display a strong legislative policy encouraging the
16 preservation of railroad rights-of-way by using existing
17 rights-of-way for interim recreational trail use."

18 Well, no surprise there. That's exactly what
19 it's all about.

20 The Court goes on to say, "The National Act
21 accomplishes this directly by providing that," quote,
22 "interim trail use," closed quote, "is a discontinuance,"
23 open quote, "rather than an abandonment," close quote, "of
24 the prior railroad use, thus preventing the right-of-way
25 from reverting under State law."

1 Preseault. "The State act demonstrates its
2 intent by giving counties and municipalities the right to
3 accept title to the railroad rights-of-way. The inescapable
4 effects of these acts --" and this is, to me, the meat and
5 potatoes of this whole decision. "The inescapable effect of
6 these acts is to allow a railroad company to transfer its
7 possessory interest in the land, i.e., the right-of-way, to
8 a third party for the limited purpose of interim
9 recreational trail use. The interim trail user essentially
10 holds the railroad company's land in trust until the
11 railroad needs to reactivate service on the railroad line.
12 In this way the legislature has effectively prevented the
13 further loss of railroad track.

14 "Thus, upon the conversion of a railroad line
15 to a recreational trail, the railroad's right-of-way does
16 not terminate, but is held in abeyance, and, thus, the land
17 does not revert to the property owner."

18 Isn't the Court -- isn't the Court saying
19 there, among other things -- or isn't it espousing the
20 principle that the right to use -- the right to transform a
21 right-of-way that had previously been used as a railroad
22 into, for instance, an interim trail use, is not an
23 inconsistent use sufficient to work a reverter to the
24 property owners?

25 MR. COHEN: I think the Court is reading the

1 language that you quoted a bit too broadly, Your Honor.

2 THE COURT: All right.

3 MR. COHEN: I read that --

4 THE COURT: How do you read it?

5 MR. COHEN: You know, Your Honor, I read it
6 basically as a matter-of-fact description of how the Rail
7 Banking Act actually -- how it mechanically works. The Act
8 itself specifically states that the rail banking process
9 precludes abandonment under State law. You know --

10 THE COURT: And if you're right -- and you might
11 well be -- that all they were doing there was explaining
12 what the theory actually is, as opposed to adopting it
13 themselves -- but the fact remains -- but the fact remains
14 this: Not only did the Court not find an abandonment, which
15 could have worked to -- worked to effectuate a reversion in
16 that case, but implicitly, at least, the Supreme Court of
17 Pennsylvania must have found that rail banking and interim
18 trail use are not inconsistent with the underlying easement.
19 Otherwise, it would have reverted on an independent basis,
20 wouldn't it?

21 That's what I'm having a problem with. And
22 I've read that case four times, and I end up at that same
23 place. The Supreme Court -- as a matter of fact, that was
24 one of the issues that got teed up in the front, although
25 they didn't specifically address it.

1 In order for you to be right, the Supreme
2 Court would had to have found in favor of the property
3 owners at least on the issue of what is the inherent nature
4 of the easement right, wouldn't it?

5 MR. COHEN: I -- I -- to be honest with you, Your
6 Honor, I have trouble with the concept -- with that concept
7 because the Court started from -- from the proposition that
8 the Trial Court did not error in finding that there was no
9 abandonment.

10 THE COURT: Right.

11 MR. COHEN: And that finding was really the key
12 finding that the Supreme Court relied upon. That was the
13 key -- in other words, the finding by the Trial Court that
14 there was no intent by Conrail to abandon was the central
15 holding of the Supreme Court in finding that there were no
16 reversionary interests that actually came to fruition.

17 The statements that the Court read, I think,
18 basically explain how rail banking works. But to the extent
19 that there may have been something that was implied in the
20 Supreme Court's decision --

21 THE COURT: It must have been, though, at least
22 implied, because -- because as they are leading into their
23 opinion, they -- they tee the issue up like this: Even
24 though they may not have done a good job in addressing the
25 second. It says, "Buffalo Township responds that the land

1 was not abandoned at the time of the quitclaim deed, thus,
2 Conrail properly transferred its interests in the property.

3 "Further, the National Act and the State Act
4 allows the transfer of the property.

5 "Alternatively, Buffalo Township offers that
6 case law from Pennsylvania allows a railroad company to
7 transfer the land to further a public use or purpose. In
8 this case, the transfer serves such purpose, and, thus, the
9 property did not revert to the underlying landowners."

10 The issue was clearly there, wasn't it?

11 MR. COHEN: Well, it certainly was -- it was
12 argued by -- it was --

13 THE COURT: But your point, it was decided on a
14 narrow issue.

15 MR. COHEN: It was.

16 THE COURT: It was decided on abandonment.

17 MR. COHEN: It was. Absolutely. I think if you
18 look at what the holding of the Court was, it was on a much
19 narrower ground that the railroad -- that Conrail did not
20 have the intent to abandon, based upon the fact that it was
21 engaged in negotiations with the trails group and that it
22 had a deed that allowed it to reoccupy -- reenter the
23 property to --

24 THE COURT: This is somewhat of a rhetorical
25 question, because I know you agree with the Preseault

1 Circuit decision; Preseault II. But let me ask it anyways.

2 Is it arguable that Preseault was wrongly
3 decided in this sense: That Preseault and cases like
4 Preseault overlook the fact that conduct inconsistent with a
5 permanent intention to abandon which comes about as a -- as
6 a result of the Rail Banking Act may be precisely the type
7 of conduct that State law would also look to, to determine
8 whether or not there was a permanent intention to abandon?
9 It gets a bit circular, doesn't it?

10 MR. COHEN: It certainly does. It certainly does.
11 I see where -- I do see what Your Honor is saying.

12 From my standpoint, the holding of Preseault
13 by the Federal Circuit and Thaves, that -- they have -- the
14 Federal Circuit has, in its infinite wisdom, decided what
15 the law is in terms of taking, and we have to apply it.

16 THE COURT: When you talk about indicia of
17 abandonment in this case, I'm going to borrow a phrase that
18 pops up everywhere. That the bundle of sticks that goes
19 into the abandonment question, isn't it important that we
20 talk about permanent intention? Because as long as -- as
21 long as a grantee retains either by way of deed, such as in
22 Buffalo Township, or expresses the desire to be able to
23 reenter and just throw that other entity out on their ear,
24 either by way of private deed, private contractual
25 relationship, or by operation of law, you can't have a

1 permanent intention to abandon, can you?

2 MR. COHEN: Well, here's where I think the --
3 there is a -- somewhat of a circular reasoning.

4 THE COURT: Unless -- and then I'll let you finish
5 your point -- unless your answer to that is it's a ruse,
6 because it's never going to happen anyways.

7 MR. COHEN: Well, you know, I think there is
8 something to that. And if you -- if you look at in the
9 Thaves case, and even though it was a -- a California trail,
10 a lot of the principles, I think, are equally applicable
11 here, in terms of the Federal takings jurisprudence. And
12 what the Court there said is that there is a reality test in
13 takings claims. And, specifically, that if there is no --
14 if there is no --

15 THE COURT: Reasonable prospect?

16 MR. COHEN: Yeah. If there is no reasonable
17 prospect of having --

18 THE COURT: Isn't that a dangerous slippery slope
19 to get on, though? I mean, I don't even know how that's
20 workable in the real world. How likely need likely be? One
21 of those types of things. I mean, I instinctively move away
22 from that. I mean, I just don't know how to handle it.

23 But it -- what happens in our case -- and I'm
24 not saying it would. But just hypothetically, I mean, the
25 railroad can read the tea leaves and can read the cases as

1 well as anybody else, I suppose. What happens if in
2 addition to whatever may operate as a matter of law in
3 connection with the rail bank language concerning a right of
4 reentry, what if the -- what if they do come to a deal with
5 either the County or the trail association, and they say,
6 oh, by the way, we'd like something in our -- we'd like
7 something put in this deed; we'd like the same language that
8 went in the deed in Buffalo II, and we're serious about it?
9 What does that do?

10 MR. COHEN: Well, Your Honor, I think at that
11 point you get to -- you get to the point where you can't
12 have essentially the -- the Act itself being used to prevent
13 a taking that arises from the Act. And that's really where
14 I think the Buffalo II Court comes very -- you know,
15 remember, Buffalo II is not a takings case. We're in a
16 different position --

17 THE COURT: Buffalo II was not. But the predicate
18 for Buffalo II is the same thing you have to establish here
19 in order to get the takings. And, actually, would it --
20 would it be a stretch for me to say that Buffalo II is
21 arguably stronger for the Defendants here because they
22 didn't even comply with the NITU in Buffalo II? And the
23 Court seemed to overlook that on the basis that that doesn't
24 matter, because, really, the STP's involvement here is so
25 administrative and perfunctory that it doesn't really

1 matter. So not only did you have noncompliance, but the
2 Court said it didn't matter.

3 MR. COHEN: Well, I think the Court in some
4 respects stated what is, in fact, true, which is the STB
5 acts purely in administerial capacity. It doesn't make any
6 judgment in issuing a NITU.

7 But at the end of the day in a takings case,
8 you can't have a situation where the Act itself -- the
9 mechanics of the Act which preclude abandonment under State
10 law is then used as an argument to preclude a taking under
11 the Fifth Amendment. It's really -- it becomes circular,
12 and it frustrates the purpose of the Fifth Amendment,
13 because the -- to go back to Justice O'Connor's concurrence
14 in Preseault I, she said, essentially, the only reason that
15 this Act is constitutional is because landowners have an
16 opportunity under the Tucker Act to receive just
17 compensation for their state law property interests that are
18 thwarted by the statute.

19 THE COURT: As an aside, there's a little Tucker
20 Act. Does that mean there's a big Tucker Act?

21 MR. COHEN: Well, nobody calls it the big Tucker
22 Act. It's just the Tucker Act.

23 THE COURT: All right. In any event, finish your
24 vibe. I just lost my train of thought.

25 MR. COHEN: Well, Your Honor, I agree that --

1 THE COURT: Oh, I had it. Let me come back here.
2 How can it be said -- this gets circular too -- that rail
3 banking is not a use that is consistent with railroad
4 purposes if the very purpose of rail banking is to keep the
5 stretch usable someday so it can be used again by a
6 railroad?

7 MR. COHEN: I'm sorry; how can it be said that it
8 is?

9 THE COURT: Your position is that rail banking,
10 one of the two occurrences under the Act, would be
11 inconsistent in this case with utilizing the easement for
12 railroad purposes. Is that correct?

13 MR. COHEN: Yes. Because it's not a present
14 railroad use. To say that we're going to use the property
15 now for nonrailroad uses, recreational uses, essentially,
16 but because -- and, again, because of the operation of the
17 Federal statute which mandates that it is rail banked, it
18 has to be available for -- to be -- to go back to railroad
19 use. To say that that's now a railroad use, I think, one,
20 is not factually correct, because it's not a present use of
21 the property for railroad purposes. And moreover, in terms
22 of a takings analysis under the Fifth Amendment, you're,
23 again, using a mechanism of the statute to defeat the
24 takings claim that's brought to remedy the statute. If --

25 THE COURT: Is your argument, at least insofar as

1 a use being inconsistent with a railroad purpose, stronger
2 on interim trail use than it is on rail banking?

3 MR. COHEN: I think it's a clearer argument,
4 because you're not talking about a -- essentially what I
5 would call a fictitious use or a fictitious purpose, this
6 rail banking, this potential use down the road that's built
7 in the Act, whereas interim trail use is actually a real use
8 that we can actually talk about, we can actually look and
9 see what's going on, we can -- we can look to see whether or
10 not it's consistent with the actual easements that were
11 conveyed by the -- by the grantors.

12 THE COURT: All right. I have asked a number of
13 questions. Now I'm going to turn the floor over to you, and
14 you can finish up telling me anything you want.

15 MR. COHEN: All right. Thank you, Your Honor. I
16 think the Court has explored the issue of abandonment fairly
17 well, so I won't belabor that.

18 In terms of the -- whether or not interim
19 trail use is consistent with -- or is a railroad purpose,
20 under Pennsylvania law, I think here you need to look at the
21 deeds themselves, look and see what the actual language is.
22 Many of these deeds actually state that the -- or the
23 purpose -- limits the use of the property to purposes of
24 said railroad. Those are clearly railroad purposes.

25 I think as the Thaves case said --

1 THE COURT: Could you have a situation where the
2 railroad did -- I'm answering my own question, but you
3 answered it for me. Could you have a situation where the
4 railroad, as a matter of Pennsylvania law, did not abandon
5 the line, and, yet, your clients still win on the basis that
6 the new use is inconsistent with the original easements?
7 Could you have that, or would that be a de facto abandonment
8 anyways? Because the cases seem to mix the concepts up.

9 MR. COHEN: Yes, they do. I think it would --
10 well, if --

11 THE COURT: Let me ask the question this way: If
12 the railroad as a matter of law did not abandon the
13 right-of-way, is there any way you can win this case? As a
14 matter of State law, it did not abandon the right-of-way, is
15 there any way you can win this case?

16 MR. COHEN: I think there is a -- there is a
17 potential argument that the -- that if the use exceeded the
18 scope of the easement granted, that that could -- that would
19 create the additional burden on the land that Justice
20 O'Connor talked about and create a takings claim.

21 THE COURT: It would be accurate for me to say,
22 though, would it not, based upon my reading of your brief
23 and the brief discussion we've had here this afternoon, that
24 most of your takings eggs are in the abandonment basket?

25 MR. COHEN: Yes, I think that's fair to say. That

1 is traditionally how these cases are analyzed. That there
2 is -- abandonment is generally a prerequisite to the -- to
3 reversionary interests coming into place.

4 However, there are cases under -- under
5 Pennsylvania law where railroad -- where railroads exceed
6 the scope of an easement granted if they are using a -- if
7 the grantor is only granted an easement for railroad
8 purposes and they use it for another purpose --

9 THE COURT: You cite the Chu case in your papers
10 involving the -- I guess that was a case where a railroad
11 line went from a railroad line to a bus line, I think, if I
12 remember correctly.

13 MR. COHEN: Yes, it did.

14 THE COURT: Do you see anything distinguishing
15 between Chu and the situation that brings us here today? Or
16 do you think it's -- what does Chu -- what does Chu do for
17 you?

18 MR. COHEN: Well, Chu, in Chu, the railroad
19 condemned a portion -- I think it was the Villanova branch
20 in 1905. The Court found that it acquired a fee simple -- a
21 feasible in the land that is titled subject to defeat in the
22 event the railroad company abandoned the land as a railroad
23 right-of-way. And then on the eve of abandonment, or
24 when -- I should say, when the railroad ceased operating the
25 right-of-way as a railroad corridor, and there was

1 proceedings before the PUC, the Commonwealth condemned the
2 property for highway purposes.

3 And the Commonwealth made many of the same
4 arguments that the Government makes here; that the
5 landowners were entitled to no compensation, because they
6 had one -- the original use was for a railroad, now it's
7 being used for buses, so they are not entitled to
8 compensation.

9 The Pennsylvania Supreme Court disagreed.
10 The Pennsylvania Supreme Court said that if the Commonwealth
11 had not condemned the land, Plaintiffs would have acquired
12 fee simple title to it, and it didn't matter that it was
13 being -- that it was being used for another purpose, even
14 another public purpose, because it wasn't the purpose that
15 the railroad had acquired under -- under its condemnation.

16 So I think that case is analogous to this
17 situation, where the Government argues that this corridor
18 should be looked upon as a public highway and its use not
19 limited merely to that of a railroad line, but to any public
20 purpose, any -- I think the Government uses -- makes the
21 argument that this is really another transportation purpose.
22 I would -- I would disagree with that. I don't think
23 recreation is transportation. But that's, I believe, the --
24 the import of the Chu case.

25 THE COURT: I'm not saying you're not right. I

1 have no fixed opinion on this at all. And I'm about to chat
2 with the Defendants.

3 But let's move from law to just policy a
4 little bit. If you're right here -- well, first of all, let
5 me say this: There's no question that the purposes of the
6 Rails -- the Federal Rails-to-Trails Act, among other
7 things, was to preserve nationwide our railroad lines, such
8 that if at a future point in time it became necessary or
9 prudent to reactivate them -- because the cost would be
10 absolutely prohibitive of trying to go back and do what has
11 been done over the past 150 years. Would you essentially
12 agree with that?

13 MR. COHEN: I would agree with that. And I would
14 also agree that the policy reasons behind the Rail Banking
15 Act are good policies. But all the Courts have said that
16 the --

17 THE COURT: And the other thing I left out -- and
18 I'll let you finish your point. Not only that, but, also,
19 so these -- these railroad lines don't lay fallow, it seems
20 to me that the other purpose was a public purpose, and that
21 was to open up large tracts of land to the public for their
22 use and enjoyment until such time as the railroads might
23 come back.

24 MR. COHEN: I agree with that also, Your Honor.
25 But I think that -- and, again, the Courts have reiterated

1 this -- the value of the public purpose is -- should not be
2 a part of the --

3 THE COURT: Equation.

4 MR. COHEN: -- the equation. Congress has the
5 right, through the commerce clause, to do this.

6 THE COURT: Right.

7 MR. COHEN: What we're talking about here is
8 whether or not --

9 THE COURT: There's a taking.

10 MR. COHEN: -- there's a taking, and whether or
11 not the Fifth Amendment takings clause has any real meaning
12 in the context of rail banking.

13 Because I think if you go down the road where
14 the Court has been going, it will essentially -- just by
15 virtue of the Act itself, no landowner, no matter what his
16 title is under State law, could ever prove a taking.
17 Because if rail banking is a railroad purpose, then --

18 THE COURT: Of course, it depends entirely, does
19 it not, on the vagaries of each State law? Does it not?

20 MR. COHEN: Sure.

21 THE COURT: To a large extent.

22 MR. COHEN: Ultimately it does. However, again --

23 THE COURT: Of course, you're right. If you take
24 one path, then under no circumstances, arguably, could you
25 ever find a situation where there has been a reversion or an

1 abandonment sufficient to constitute a taking.

2 On the other hand, if you take the other
3 path, it would almost cause the whole system to collapse,
4 because you'd almost never -- I'm going to use -- almost use
5 a double negative. You would always find a situation,
6 practically, where there had been a taking. Isn't that
7 right? Aren't there two extremes here?

8 MR. COHEN: Well, I disagree with that statement
9 to the extent that in many instances, the railroad owns most
10 of the corridor in fee. I mean, there's many instances
11 where this is not an issue, because the railroad has fee
12 simple title to the corridor.

13 The only time you even have this issue is
14 when the railroad only obtained less than fee simple.

15 THE COURT: When does your statute of
16 limitations -- assuming that the Federal Circuit law is the
17 law, when does your statute run in this case?

18 MR. COHEN: It began, I believe, in October --

19 THE COURT: 2003.

20 MR. COHEN: So 2009. Two years.

21 THE COURT: All right. We're going to take a
22 short break. I'm going to hear from the other side.

23 MR. COHEN: Thank you, Your Honor.

24 (Recess held from 2:20 p.m. till 2:26 p.m.)

25 MS. TARDIFF: Thank you, Your Honor. May it

1 please the Court.

2 I set aside my notes here because I think
3 maybe the best place to start is by kind of going through
4 some of the issues you discussed with Plaintiff's counsel
5 and addressing those. And I think where I'd like to start,
6 what might be the most helpful it to kind of talk about the
7 dynamics between--

8 (Ms. Tardiff asked for clarification by the
9 reporter.)

10 MS. TARDIFF: To speak a little bit about the
11 relationship between the inquiry as the Government has
12 framed it as kind of a scope of the right-of-way, scope of
13 the easement question, and whether --

14 THE COURT: I apologize. You are here for who?

15 MS. TARDIFF: For the United States.

16 THE COURT: Oh, you're here for the United States.

17 MS. TARDIFF: Yes. Unless you wanted to hear
18 from --

19 THE COURT: No, that's fine. I just need to know
20 who is talking to me.

21 MS. TARDIFF: Okay. Sorry. Yes, Your Honor, Kris
22 Tardiff for the United States.

23 So, again, I think one of the best places to
24 start would be to talk a little bit about the relationship
25 between the two inquiries as the parties have framed them.

1 And we have, on one hand, the scope of the easement, the
2 scope of the right-of-way inquiry and whether the uses
3 authorized by the Trails Act are permissible uses of the
4 right-of-way under that inquiry, versus the question of
5 abandonment and whether the railroad's actions, including
6 those present uses, as authorized, are -- constitute
7 abandonment or demonstrate intent to abandon --

8 THE COURT: I think that's fair. But before we
9 even do that --

10 MS. TARDIFF: Sure.

11 THE COURT: -- let's talk about the ripeness
12 question here.

13 MS. TARDIFF: Okay.

14 THE COURT: That bothers me greatly in this case.
15 Because we have a case where the -- the final chapter in the
16 rail banking saga has not been written, and it could be. I
17 don't know what the future holds.

18 But, you know, the strange thing about this,
19 come April 5th or 6th, or whenever their next extension is
20 up, what happens if A & E says, you know what, we're out of
21 here; we abandon this thing? All this is sound and fury
22 signifying absolutely nothing, isn't it?

23 MS. TARDIFF: That's a fair concern, Your Honor.
24 And one of the reasons we proceeded this far -- and I think
25 this is true for both the parties -- is that we are bound,

1 to some extent, by what the Federal Circuit has ruled in
2 terms of claim accrual. And they have said quite clearly in
3 Caldwell and then Barclay, which is the decision that
4 followed the Caldwell decision, that these claims -- takings
5 claims brought under the Trails Act accrue at the time this
6 notice of interim trail use or NITU is issued by the Surface
7 Transportation Board. That that is the start -- at least
8 that triggers the statute of limitations.

9 Now, there are cases -- and this is one of
10 them -- where a claim can accrue for statute of limitation
11 purposes, and, yet, there are activities that are still
12 going on that may affect the nature of the claim.

13 THE COURT: If you know, how have Courts, where
14 that situation exists, like it does here, how have they
15 handled that on this issue?

16 MS. TARDIFF: In the Rails-to-Trails takings
17 context, this is the first case we've had with this fact
18 pattern. And to be perfectly honest, Your Honor, we
19 struggled with how --

20 THE COURT: Because there's a contingency here --

21 MS. TARDIFF: Yes.

22 THE COURT: Let me be just very blunt about it. I
23 have a question as to whether I have jurisdiction; whether
24 this is a -- in the sense of whether there is a justiciable
25 controversy, because there is a potentiality in the future

1 that could render this whole thing completely moot.

2 MS. TARDIFF: We think that the Court does have
3 jurisdiction. And this stems, in part, from the Federal
4 Circuit's decision in Caldwell and Barclay that say these
5 claims are right, Plaintiffs have the right to bring them,
6 even though there are events transpiring that may better
7 define what those claims are.

8 THE COURT: But in Caldwell, did Caldwell envision
9 the situation where -- well, in Caldwell, had the Trail Act
10 run its course, such that there -- I mean, were they at a
11 different place than we are procedurally?

12 MS. TARDIFF: Procedurally, yes. Although the
13 focus of the Caldwell decision was statute of limitations.
14 But in Caldwell, there had been a rail banking interim trail
15 use agreement negotiated by the parties.

16 THE COURT: Did you consider filing a Motion to
17 Dismiss based in part upon Article III issues here?

18 MS. TARDIFF: We did not, because we believe that
19 that would be inconsistent with what the Federal Circuit has
20 told us in Caldwell regarding claim accrual.

21 Now, what we did consider at one point is
22 whether we ought to stay these proceedings for a period of
23 time.

24 THE COURT: Well, that's my next question.

25 MS. TARDIFF: Yes. Until we know what is going to

1 happen. And that may still be the right choice here,
2 because I understand --

3 THE COURT: Because you could end with a purely
4 advisory opinion that means nothing.

5 MS. TARDIFF: And we don't want to ask the Court
6 to spend time doing that, and that doesn't serve the
7 parties' interests either.

8 One of the reasons we did decide to move
9 forward instead of staying -- and we're certainly open to
10 discussing a stay and would not be opposed to one under the
11 circumstances, particularly in light of the issues that have
12 been raised. One of the reasons we moved forward and
13 briefed this on a Preseault-type case on the assumption that
14 there will be a rail banking interim trail use agreement
15 reached --

16 THE COURT: Is it likely -- I mean, if anybody
17 knows -- it strikes me -- and I don't know what the
18 statistics are. But I think it is the exception rather than
19 the rule that an agreement isn't reached in these cases. Is
20 it likely that there will be some agreement reached someday
21 in this case?

22 MS. TARDIFF: I spoke with both the railroad's
23 counsel and the attorney for the County that's kind of
24 taking the lead here in the trail group, and -- just on
25 Tuesday of this week, before I headed down here, and my

1 understanding from my conversations with them, which is
2 consistent with conversations I had with them back when we
3 started briefing, is that an agreement is imminent --

4 THE COURT: And I know it's not part of the
5 record, and --

6 MS. TARDIFF: No, it's not.

7 THE COURT: -- certainly Mr. Cohen can chime in.
8 This is just for background. But what, for goodness sakes,
9 has taken them so long? I mean, we're not negotiating the
10 Louisiana Purchase here. This is just a short strip of
11 land. What is going on here?

12 MS. TARDIFF: I don't know the details of what's
13 transpired over the last couple of years, because the United
14 States is not a party to that transaction. The
15 Transportation Board is not.

16 THE COURT: I understand.

17 MS. TARDIFF: But my understanding, from talking
18 to the County's attorneys and the railroad's attorneys, is
19 that they have an agreement framed out or a basic agreement
20 on all the terms. The counties are doing some due diligence
21 with respect to title issues; making sure there are no
22 environmental issues on the corridor that would be of
23 concern to them. The railroad, for its part, is conducting
24 an appraisal of the corridor.

25 It is the railroad's intent, at this time

1 anyways, to donate the line to the counties or the trail
2 group. And so as part of its --

3 THE COURT: One or the other?

4 MS. TARDIFF: To -- probably to the trail group,
5 although I don't know that detail. I think since we had
6 this West Creek Trail Association that has stepped in as a
7 sponsor --

8 THE COURT: But whether it would be -- and, once
9 again, this is outside the record. But is it your
10 understanding that whether it would be the County or the
11 trail group, even if it was the County, it would still, in
12 part, be used for trail purposes?

13 MS. TARDIFF: That's my understanding. Again,
14 although that could take, you know, years to come.

15 THE COURT: All right. Well, we'll talk about
16 stay and other issues later, and I'll let Mr. Cohen weigh in
17 on that.

18 Now let's go to the merits on this thing.

19 MS. TARDIFF: Absolutely. And I don't think at
20 this point -- we certainly wouldn't be opposed to a stay to
21 allow this to develop, particularly when it doesn't appear
22 that it's going to be that much longer before we'll know
23 which direction the regulatory proceedings are going.

24 So let me get back to the merits and kind of
25 a comparison to the scope of the easement inquiry and then

1 abandonment on the other side. And I have put a lot of
2 thought into this as well, because the parties have
3 approached this a little differently.

4 But I think when we read cases like Buffalo
5 Township and then look at cases that have come out of the
6 Federal Circuit, whether it's Thaves on one end of the
7 spectrum, Chevy Chase on the other end, that the scope of
8 the easement inquiry is really almost one side of the coin,
9 and abandonment is the other side of the coin.

10 And let me explain that. If the railroad --
11 or if the Court approaches the scope of the easement
12 question first or scope of the right-of-way and asks whether
13 the present uses, as authorized, rail banking and/or interim
14 trail use, are permissible uses of this right-of-way, then
15 that is really the end of the inquiry. You don't -- if
16 those uses are permissible, then it follows that those uses
17 cannot be -- would not support a finding of intent to
18 abandon or actual abandonment.

19 THE COURT: Because they would be consistent with
20 the original use.

21 MS. TARDIFF: Correct. So they couldn't be --
22 they wouldn't demonstrate an intent to permanently abandon
23 the right-of-way.

24 THE COURT: On the other hand, but the flip side
25 could go this way: If those -- if those uses were

1 inconsistent with the original use, even if the railroad did
2 not intend to permanently abandon, there could still be a
3 reversion.

4 MS. TARDIFF: If the uses were found to be
5 inconsistent with the right-of-way --

6 THE COURT: Yes.

7 MS. TARDIFF: -- then -- well, from the
8 perspective of this case --

9 THE COURT: Because the property would be burdened
10 in a way that it was not originally contemplated. That's
11 the way to put it.

12 MS. TARDIFF: Yes. And if the Court then further
13 found that there was no shifting public-use-type doctrine
14 available under Pennsylvania law that would allow that
15 change in public use, you have to take that step as well.

16 THE COURT: Right. Then the abandonment would be
17 irrelevant. So they are slightly distinct, aren't they?

18 MS. TARDIFF: They are slightly distinct.

19 THE COURT: And, by the way, I have to tell you,
20 both sides here, that I have not heard the term "fee simple
21 absolute" or "determinable" since my first year of law
22 school, so this has been quite an experience.

23 MS. TARDIFF: I have commented to some colleagues
24 of mine who actually teach property law that, really, what
25 they need to do is take one of these cases, and they could

1 teach an entire first-year property law, based on what --

2 THE COURT: I wished I had paid better attention
3 in my first-year property law.

4 MS. TARDIFF: I think we all had to re-learn a few
5 of these terms as we proceeded.

6 THE COURT: Go ahead.

7 MS. TARDIFF: So, anyway, as I just discussed, in
8 a case such as this, we believe it's appropriate for the
9 Court to kind of begin with the scope of the easement, scope
10 of the right-of-way inquiry, and it may be that you just
11 don't even get to the question of abandonment at all.

12 THE COURT: How do I approach that issue?

13 MS. TARDIFF: On the scope of the easement or
14 scope of the right-of-way -- and I use both terms, and maybe
15 we can say just easement. But by using easement --

16 THE COURT: Let's just say right-of-way, and I
17 will assume that the easement is subsumed within that term.

18 MS. TARDIFF: It is. And I just want to clarify
19 that even when the term "easement" comes into play here,
20 we're not talking about a common law easement. We have
21 cited some cases here. But railroad easements, even when
22 they are called easements, are a different creature.

23 THE COURT: Walk me through the analytical process
24 that I would go through in resolving that issue.

25 MS. TARDIFF: I think we agree with the Plaintiffs

1 that the starting point for that -- for this inquiry, the
2 scope of the right-of-way inquiry, is to look back at the
3 original conveyance documents to the railroad.

4 THE COURT: And what would that -- when I do that,
5 what do you believe that will show me?

6 MS. TARDIFF: In this particular case, we believe
7 the Plaintiffs have interpreted the conveyance documents
8 here -- and we have a number of them. They are all in the
9 record. We have a number of deeds. There are also some
10 condemnation awards in play here.

11 The parties have stipulated that these were
12 conveyances of a right-of-way for railroad purposes.
13 Plaintiffs take that and say, well, railroad purposes, that
14 means they can run trains on it, but they can't do anything
15 else. Our --

16 THE COURT: Well, some of the deeds, if I go
17 look -- putting aside the condemnation deeds.

18 MS. TARDIFF: Um-hum.

19 THE COURT: But are some of the deeds, if I read
20 them, going to be much more, by their language, restrictive
21 in what arguably could be done in the future than others?

22 MS. TARDIFF: In this particular case, Your Honor,
23 I don't think any of the deeds that we are presented with
24 are restrictive at all. They make reference to the fact
25 that it's intended that this right-of-way would be used for

1 railroad purposes. But, you know, that's obvious from the
2 fact that it was a conveyance to a railroad that had
3 authority to build rail lines.

4 THE COURT: Are all of -- aside -- tell me if I
5 got the major categories here. I and V and part of IV are
6 fee simple. Is that right?

7 MS. TARDIFF: I think that's correct, Your Honor.

8 THE COURT: And then there's something that has
9 been referred to as a conditional fee in II.

10 MS. TARDIFF: Correct. A fee simple determinable.
11 But that's a conditional fee.

12 THE COURT: For my purposes in analyzing what was
13 granted at the time, is there a difference between a fee
14 simple determinable and an easement for railroad purposes?

15 MS. TARDIFF: For the purposes of this case, under
16 Pennsylvania law, we don't believe that there is a
17 difference, a meaningful difference between those two. That
18 might be different in some states, but under Pennsylvania
19 law, whether we're dealing with a fee simple determinable
20 that has a right of reverter or the conveyance of just a
21 right-of-way, where there is also a reversionary interest,
22 which is really the same thing --

23 THE COURT: Is the only difference, as you see it,
24 that in some of the deeds, it was specifically spelled out
25 for railroad purposes, and in the fee simple determinable,

1 there would be a right of reverter, but there would be no
2 specific description as to the purpose, but it would be
3 implied because it was a railroad?

4 MS. TARDIFF: I think that's correct. And we do
5 have one deed that has more of a description. I think we
6 have described it in our reply brief. I want to say it's a
7 Category II deed that gives a fairly broad description of
8 the type of uses that are contemplated in terms of railroad
9 uses. But it's not limiting language. It's --

10 THE COURT: What about the warranty deed? Is
11 there a warranty deed or deeds? And what are they?

12 MS. TARDIFF: We have warranty deeds that the
13 parties have stipulated conveyed fee simple interests to the
14 railroad, so those are the group that the parties agree
15 there is no reversionary interest.

16 THE COURT: All right. Is it the position of the
17 United States, then, in sum, that with respect to any of the
18 deeds that remain in play here, which is any of them other
19 than the fee simple absolute deeds and -- the other deeds
20 and the land that was condemned, that the same analysis that
21 all of those, either explicitly or by implication, are
22 essentially easements for railroad purposes? Is that your
23 position?

24 MS. TARDIFF: The parties are in agreement on
25 that. I think the distinction between the parties' position

1 here is whether the reference to railroad purposes, where
2 there is such a reference, whether that is intended to be
3 limited language or whether it's just a description of the
4 use that everyone knew that this would be -- the
5 right-of-way would be put.

6 So that's an important difference. And
7 Plaintiffs have just assumed in their argument that railroad
8 purposes and the reference in the deeds is limiting, you
9 know, by its terms, and that's not correct. And I think --

10 THE COURT: Why isn't -- why -- how do I go back
11 with -- how do I go back to 1886, for instance, and get into
12 the mind of the grantor and grantee and define what they may
13 have thought was a railroad purpose, if the deed doesn't
14 spell it out?

15 MS. TARDIFF: That's a very fair question, and the
16 answer is if it's not clear on the face of the deed -- and
17 it isn't here. There's just simple references to railroad
18 purposes, with the one exception I mentioned, which gives a
19 rather long laundry list of possible uses. At that point I
20 think what we have to do is go back and look at the
21 authorizing legislation, because the railroad in question
22 here, as any railroad that was constructed in Pennsylvania,
23 had to have authorizing legislation basically incorporating
24 the railroad as a matter of Pennsylvania law. Those
25 authorizing statutes spell out what rights the railroad had

1 in its construction of right-of-ways and rail lines within
2 the Commonwealth.

3 And when we look back at those authorizing
4 legislations -- and there's, I think, an 1847 and an 1849
5 Act in the record that we have cited to you in particular --
6 it's quite clear that the railroads were given very broad
7 authority, including condemnation authority, which ties back
8 to kind of the public nature of these rights-of-ways in the
9 first instance.

10 THE COURT: Well, what does the authorizing
11 legislation which permitted railroads in the first instance
12 to get up and running in Pennsylvania, what does that
13 tell -- what should that tell me or can it tell me on the
14 question of the scope of the easement?

15 MS. TARDIFF: What it tells us is that the
16 railroads were authorized to go out and acquire
17 rights-of-way for the purposes of constructing, maintaining,
18 and running their -- their railroads.

19 There's references in -- I think it's the
20 1847 Act, Section I, in particular, to, you know, making use
21 of these lands for transportation purposes. There's further
22 reference in those authorizing statutes about transportation
23 of passengers, transportation of freight. And then, again,
24 references throughout about the public nature of these
25 rights-of-way.

1 THE COURT: But one would think, wouldn't you,
2 that -- and this is why it gets so difficult, if the
3 exercise is to define the intent of the original parties. I
4 mean, it would not be a stretch, would it, if, for instance,
5 some of this land -- and I'm not saying it was. But to pick
6 a date, 1875, some of this -- we have a -- we have a
7 conveyance and easement for railroad purposes.

8 Do you think it was the slightest flicker in
9 either of those parties' minds that someday on the stretch
10 that they had just conveyed, rather than having an old
11 railroad train belching smoke, running up and down it, that
12 you would have 10,000 people on motor bikes or on -- riding
13 surreys, or those covered things, or bicycles or God knows
14 what -- recreational use -- could that have been
15 contemplated at the time?

16 MS. TARDIFF: At that point in time I think trail
17 use, as we know it today, probably was not contemplated. It
18 wasn't -- it just wasn't within the realm of what people
19 thought about in terms of transportation.

20 But that doesn't mean that the present uses
21 authorized by the Trails Act are not permissible. I mean, a
22 right-of-way is the right of passage across land, and --

23 THE COURT: Do you need the shifting public use
24 doctrine in order to transform rail banking and interim
25 trail use into -- to create the fiction that those uses do

1 not necessarily tread upon the original uses contemplated by
2 the easement?

3 MS. TARDIFF: Absolutely not. And let me explain
4 that. Rail banking and interim trail use are two distinct,
5 present uses of the corridor that are authorized under
6 Federal law. Rail banking, as a separate use, is a
7 preservation of these corridors so that they are available
8 for future active rail use.

9 In that respect, rail banking is really the
10 Federal law equivalent of mere nonuse of a right-of-way for
11 a period of time, which has always been permissible under
12 State law. We just have a Federal mechanism in place for
13 it.

14 THE COURT: What about the interim trail use?

15 MS. TARDIFF: Interim trail use --

16 THE COURT: That's a harder argument to make,
17 isn't it?

18 MS. TARDIFF: I will concede it's a little hard,
19 but nonetheless we think that interim trail use still --

20 THE COURT: And I'll tell you why. Because --
21 because if the only purpose here was to preserve a line for
22 the future enjoyment of the grantee, the railroad, you could
23 accomplish that perfectly by simply rail banking and doing
24 absolutely nothing else, couldn't you?

25 MS. TARDIFF: Well, that's true. And prior --

1 THE COURT: I mean, end of story. You have
2 preserved the bed. They still have the right to go back in,
3 but you don't have hypothetically hundreds of thousands of
4 people moving up and down the property every summer.

5 MS. TARDIFF: And one of the reasons -- and let me
6 step back. Under Federal regulatory law with respect to
7 railroads, there has -- there was a mechanism in place for
8 rail banking before the current version of the Trails Act
9 that we're dealing with in this case, and that's called a
10 discontinuance.

11 THE COURT: Right.

12 MS. TARDIFF: And so railroads have always had the
13 option of discontinuing their present use of a right-of-way
14 while still maintaining ownership, control, and full
15 financial responsibility.

16 And what Congress found is that that
17 additional burden of having financial and management
18 responsibilities for these corridors during a period of
19 nonactive rail use was cost-prohibitive for a lot of
20 railroads, and that railroads were not using that as an
21 option. Because bear in mind that this is voluntary.

22 THE COURT: So you needed another caretaker to
23 come in and maintain the premises, if you will, during the
24 railroad's absence.

25 MS. TARDIFF: Correct. There's benefits to the

1 railroad, certainly to the trail group, and, frankly, to
2 abutting landowners to have an active presence managing and
3 financially responsible for the corridor during a period of
4 nonactive --

5 THE COURT: Now, all that said, from whence
6 springs your contention that interim trail use does not
7 represent a new use or an old -- a new burden on the
8 easement that would not have reasonably been contemplated at
9 the time of the original deeds?

10 MS. TARDIFF: Well, it stems back to the need to
11 define what the scope of this right-of-way is in the first
12 instance and whether it is strictly limited to the active
13 running of trains or whether it is a broader --

14 THE COURT: All right.

15 MS. TARDIFF: -- right-of-way easement.

16 THE COURT: That's the question. But where do I
17 go to find the answer?

18 MS. TARDIFF: Again, I think we go back to -- we
19 start with the deeds at issue here, or the condemnation
20 awards --

21 THE COURT: They won't tell me anything about
22 interim trail use.

23 MS. TARDIFF: They won't tell you anything, but
24 they also don't have limiting language that restricts the
25 manner in which the railroad is using the corridor. The

1 railroad has broad discretion in terms of determining what
2 uses serve and further railroad purposes in this case.

3 And, here, we have clear indication that the
4 railroad --

5 THE COURT: Could a railroad -- and I don't
6 mean -- sometimes to test the principle, you need to go a
7 little to the absurd. Could a railroad, rather than -- as
8 part of an NITU -- of course, I suppose it would still have
9 to be approved. But if a railroad was to convey its
10 property to an amusement park, such that you had a Ferris
11 wheel and that type of thing, would that -- if their
12 discretion is broad, where does it end?

13 MS. TARDIFF: Well, I think there are -- there are
14 a couple of limitations. First of all, any interim use that
15 is made of the right-of-way during the rail banking period
16 needs to be consistent with rail banking. The trail sponsor
17 or the entity responsible for the corridor cannot put the
18 corridor to a use that is going to interfere with or
19 preclude the restoration of rail service. So --

20 THE COURT: All right. So you couldn't have a use
21 where it would render it infeasible for the railroad to come
22 back.

23 But that having been said, I'm still looking
24 for a common touchstone here. And would it be that in terms
25 of describing the breadth of the railroad's discretion --

1 and is it your position that the railroad could convey the
2 property to any entity, so long as it involved the movement,
3 either vehicular, recreational, or on foot, of movement of
4 people?

5 MS. TARDIFF: As long as --

6 THE COURT: Because, otherwise, the -- the
7 discretion of the railroad cannot be unbounded. There has
8 to be some bound to it.

9 I'm trying to decide what the benchmarks
10 would be to decide whether there has been -- whether they
11 have exceeded their legitimate discretion.

12 MS. TARDIFF: I think there are a couple of bounds
13 that the parties and the Court need to be mindful of.

14 Number one, whether it's the railroad or
15 someone in charge of interim trail use for a period of time
16 in using the corridor, the use has to be a public one and,
17 really, a transportation one. You know, a movement --
18 passage of people across land.

19 THE COURT: Would any use -- would any use that is
20 a public use, as long as it is not inconsistent with the
21 eventual reuse of the railroad line, be acceptable?

22 MS. TARDIFF: The Federal law specifically refers
23 to interim trail use, so I think that is the use that is
24 authorized by Federal law. I think it's conceivable
25 under -- as a matter of Pennsylvania State law that a

1 railroad could come in, and as long as -- and, say, build a
2 road that's used for cars. And I think as long as that's --
3 as long as it remains a public use, a transportation use,
4 that that's probably authorized as a matter of State law.

5 But, again, here, as a matter of Federal
6 law -- and when we talk about liability here, I need to
7 emphasize that the National Federal rail banking law, the
8 focus and the authorized use is interim trail use.

9 THE COURT: Are you saying that interim trail use
10 may reasonably be construed as one of the appropriate uses
11 that would have been subsumed within the original easements
12 on the theory that interim trail use is just another
13 mechanism of preserving the rail banking?

14 MS. TARDIFF: I think that's accurate. It is.
15 It's a mechanism. It furthers the rail banking purpose by
16 essentially encouraging railroads to voluntarily rail-bank
17 their corridors because there's somebody coming in and
18 taking responsibility --

19 THE COURT: But what if I find that interim trail
20 use is a new use? In other words, is a use that was not
21 originally subsumed within the original easements. Is that
22 when your public use doctrine shifts in?

23 MS. TARDIFF: That would -- well, there's two
24 parts of the inquiry. The Court would still need to address
25 rail banking as an independent --

1 THE COURT: Well, let's put rail banking aside.

2 MS. TARDIFF: If we put that aside and are just
3 looking at interim trail use, and the Court finds that,
4 okay, rail banking is okay, but interim trail use, well,
5 that's another layer here, and that exceeds the use, at that
6 point, yes, then I think we kick over to the concept of
7 shifting public uses. And, again, then have to go back and
8 look, perhaps, at the authorizing legislation and
9 Pennsylvania's Rails-to-Trails Act, quite frankly, because
10 that is certainly an indication from the Pennsylvania
11 legislature that they do view trail use of these corridors
12 as serving a public transportation purpose as part of a
13 multi-modal transportation system.

14 THE COURT: So, first of all, are you aware of
15 any -- interestingly enough, when you look around the
16 country in other states, there are very few state decisions
17 that actually use the term "shifting public use". I mean,
18 the concept is out there, but I would have thought --
19 there's none in Pennsylvania that I have been able to find.

20 MS. TARDIFF: We didn't find any that actually use
21 that term. And we employed the term in our brief just
22 because that's kind of a modern label that's been applied to
23 a concept that's been around for generations.

24 THE COURT: And the concept is this: Tell me if
25 this is right. That certain types of property are

1 inherently viewed with a latent potentiality for public use
2 or enjoyment, such that if they move from one type of use to
3 that type of use, there has been no taking.

4 MS. TARDIFF: I think that's an accurate summary
5 of what the doctrine is, correct.

6 THE COURT: Well, what is your take -- I've heard
7 Mr. Cohen's take. What is your take on Buffalo II?

8 MS. TARDIFF: Well, I think Buffalo II is -- well,
9 certainly on the abandonment question, I think it's
10 dispositive here. I think in Buffalo II, the Court looked
11 at what the railroad had done in terms of participating in
12 the regulatory process, quitclaiming its interests to a
13 salvage company, then pulled up all the rails and ties, and
14 then the salvage company, in turn, quitclaims it to the
15 Township for trail purposes, with the railroad retaining a
16 right of reentry. So it's very similar to what we have
17 here.

18 And I think there, under the theory of
19 abandonment, the Court said, well, those actions don't
20 constitute abandonment, because they are consistent with the
21 right-of-way.

22 THE COURT: But like we said a minute ago, though,
23 you could theoretically -- theoretically -- and I just say
24 theoretically because I have no fixed opinion on it. Even
25 if you're right under Buffalo II, that there's been no

1 abandonment here, that's not the end of the inquiry, is it?

2 MS. TARDIFF: Well, if you flip, then, to the
3 scope of the easement, no, it's not the end of the inquiry.
4 But I think conceptually if the actions taken -- and let's
5 look at Buffalo Township. If those actions don't constitute
6 abandonment, they don't demonstrate attempt to abandonment,
7 they don't demonstrate actual permanent abandonment of the
8 right-of-way, I think at the same time those actions are
9 viewed as within the right-of-way.

10 THE COURT: Are you saying that as a matter of
11 law, someone would be deemed to have abandoned their
12 entitlement to an easement, even though they had no present
13 intention or permanent intention to do so, if their conduct
14 or activities on the easement were inconsistent with those
15 that had originally been granted? Is that what you're
16 saying?

17 MS. TARDIFF: It wouldn't be abandonment in that
18 interest, but --

19 THE COURT: It wouldn't be. It seems to me that
20 it would work a -- at that point in time, the land would be
21 burdened in a way that it had not heretofore been, and there
22 would be a taking at that point and perhaps a reversion. Is
23 that right?

24 MS. TARDIFF: Well, assuming the Court found that
25 there was some additional burden that exceeded the scope of

1 the original easement, then yes.

2 THE COURT: Don't you -- isn't your position to a
3 large extent on this interim trail use -- aren't you in a
4 much better position on that argument if I were to conclude
5 that interim trail use is authorized under this shifting
6 public use doctrine than if I were to conclude that it's
7 not?

8 MS. TARDIFF: In terms of not reaching shifting
9 public uses, or --

10 THE COURT: Putting aside rail banking -- because
11 I can see there may be material differences between rail
12 banking here and trail use. But on the limited issue of
13 whether or not interim trail use represents a new burden on
14 the easement, don't -- isn't your position largely dependent
15 upon my finding that that type of use is authorized under a
16 Pennsylvania version of the shifting public use doctrine?

17 MS. TARDIFF: Not entirely. I think that our
18 reliance on the shifting public use doctrine or any other
19 label you want to attach to that concept is really a
20 secondary argument.

21 I think in the first instance, it's the
22 Government's position that interim trail use is either a
23 railroad purpose or serves a railroad purpose, or,
24 alternatively, it's a transportation purpose. And under
25 either of those two scenarios, it is within the scope of

1 this right-of-way as it was originally created.

2 And, again, to support that, I would refer
3 the Court back to the original authorizing legislation for
4 the railroads, which makes reference both to transportation
5 uses and gives the railroads broad ability to determine what
6 uses it's going to make of that right-of-way to further its
7 railroad uses.

8 And, here, where there is a rail banking
9 mechanism in place, you have a railroad that has said, well,
10 okay, rather than abandoning this outright, so that it's not
11 available to us in the future, we are going to participate
12 in this rail banking process, and interim trail use is a
13 layer of that, that furthers that rail banking and helps us
14 preserve it.

15 THE COURT: Does Buffalo Township give me any
16 guidance on the question of shifting public use?

17 MS. TARDIFF: I -- not in so many words, but -- I
18 mean, it doesn't use that phrase. But I think by pointing
19 to the State Trails Act there and saying that Trails Act
20 is -- or trail use is an appropriate use of a corridor, we
21 have the Pennsylvania Supreme Court saying that trail use is
22 a -- whether you call it a railroad use or a transportation
23 use, it is a legitimate use of a railroad right-of-way that
24 is a -- that is a public right-of-way in this Commonwealth.

25 THE COURT: Now, I'm not sure it's a particularly

1 useful way to look at it. I'm not sure that it's not. But
2 the Preseault Court, I think, when it was analyzing this
3 question of additional burden, in terms of interim trail
4 use -- and I'm paraphrasing. But I think the upshot was
5 there's a world of difference between a train running down
6 your track a couple times a day and thousands of people
7 rolling through your back meadow on bicycles and heaven
8 knows what.

9 Can't you envision in the extreme case a
10 distinct change in the character of use between the
11 occasional train going down the track and a very popular
12 trail that might run through some of the most scenic country
13 in the United States?

14 MS. TARDIFF: I think it gets us back to whether
15 that trail use, you know, serves or fulfills the original
16 purposes of the right-of-way, which is, you know, the
17 movement of people and originally perhaps freight as well.

18 And I think talking about Preseault -- and
19 then Plaintiffs rely heavily on the Thaves case, which is
20 out of the Federal Circuit as well -- I think the thing
21 you -- the point, I think, we would leave Your Honor with is
22 that what we have out of the Federal Circuit is really a
23 spectrum of decisions. On one hand, you have Thaves and
24 Preseault --

25 THE COURT: There's not a lot of case law on this

1 around the country, is there?

2 MS. TARDIFF: There is not. There is not. And --

3 THE COURT: Why is that? Is this property
4 movement something that's only -- when I say "property
5 movement", I'm talking about -- I guess not much could
6 happen before Preseault, the United States Supreme Court,
7 which opened the door on the thing, I suppose --

8 MS. TARDIFF: I think that certainly was a trigger
9 point for a lot of these claims. I think prior to that,
10 there was probably rail banking going on and just no
11 litigation as a result.

12 But we have a limited body of cases, but,
13 again, stepping back and kind of looking at the spectrum we
14 have, you have Preseault, which was a very fragmented
15 decision, and the Federal Circuit really struggled there.
16 And, frankly, had there been a mechanism for certifying the
17 State law, questions there to the Vermont Supreme Court,
18 they would have done so. There was no mechanism in place at
19 that time. This is now, unfortunately, but that didn't help
20 us.

21 In Thaves, you had the Federal Circuit,
22 again, applying California law and doing it themselves,
23 rather than certifying.

24 On the other end of the spectrum, one of the
25 cases we cited to the Court is the Chevy Chase decision,

1 also out of the Federal Circuit. But in that instance, the
2 Federal Circuit said, you know, Maryland law is not entirely
3 clear on these issues. We're going to certify it to the
4 Maryland Court of Appeals, which is their Supreme Court, and
5 get their answer. And in that case, the Maryland high Court
6 came back and said, okay, yeah, we have an easement here,
7 but, you know, this is a general right-of-way easement.
8 There is no limiting language in the deeds. It is perfectly
9 appropriate for the railroad to rail-bank this corridor.

10 Trail use is a permissible use. These are all public uses.

11 And trail use is, really, the transportation
12 of people. The fact that some people view it as recreation
13 and others view it as transportation is not a triggering
14 issue. And I submit that that's always been the case. My
15 grandparents used to take a train from Wooster,
16 Massachusetts up into the White Mountains of New Hampshire
17 to spend the weekend, when train -- and it was recreation.
18 They were just using it as a means to get there. When that
19 train service ended, they started driving their car up to
20 the White Mountains for their weekends.

21 THE COURT: Now you can bike up on the same trail.
22 Let me hear what the amicus has to say.

23 MS. TARDIFF: Okay. Very good. Thank you.

24 MR. SEMINS: Your Honor, I'm Bill Semins, local
25 counsel for amicus Rails-to-Trails.

1 THE COURT: Before you start there, let me just
2 say, you raise an issue that had not been raised by the
3 United States in this case, and that is whether or not
4 whatever occurred is sufficient to constitute a taking. I
5 think it was the last issued raised. And you did roll over
6 some of the same ground.

7 In all likelihood, I'm going to give you an
8 opportunity to respond to that, if you want, by way of a
9 short reply brief, although I have to tell you, given all
10 the other issues in this case, and in my general desire to
11 decide cases on the narrowest statutory or constitutional
12 basis, that it would be unlikely that I would wade into
13 that, because I don't have to.

14 But that having been said, let's start with
15 the argument that wasn't raised by the United States.

16 MR. SEMINS: Basically, to put that argument in
17 its proper context -- and I think you understand the
18 framework, based on the presentation today and the questions
19 that you asked -- is that you've got the three hurdles as we
20 see it.

21 The major hurdles that Plaintiffs face in
22 this case are whether or not there's a reversionary
23 interest, what the nature of that ownership interest is.
24 The second step is whether there's been an abandonment; both
25 questions under Pennsylvania State law.

1 We don't think there has been an abandonment.
2 Again, we reiterate the Government's position that Buffalo
3 Township is controlling.

4 However, if the Court does find an
5 abandonment, and we get to the takings issue -- and I want
6 to, again, place our argument in its proper context. The
7 next question that will arise is what's the nature of the
8 taking, what's the standard that should be applied to
9 determining, you know, what kind of taking this is, and when
10 did the taking occur.

11 And it's clear from the Court's questions to
12 the various parties that you have a good understanding of
13 the timing issue, and that's what leads to these questions
14 of judiciability under Article III and ripeness. And,
15 again, we don't -- we would argue that it's not ripe, and if
16 there is no physical occupation of the land, therefore, this
17 case is moot at this point.

18 THE COURT: Are you aware of any cases -- well, I
19 guess there aren't any. I mean, I'm told that this is the
20 first case which finds itself in this procedural posture
21 where there's an NITU, but the process hasn't run its
22 course. Is that right?

23 MR. SEMINS: That is correct, Your Honor.

24 THE COURT: And that's why you're jumping in here,
25 among other things, and seizing this opportunity to try to

1 get a ruling on that narrow issue of law. Is that right?

2 MR. SEMINS: Yes, Your Honor.

3 THE COURT: All right.

4 MR. SEMINS: And I'm joined today by Andrea
5 Ferster, general counsel from Rails-to-Trails, who has a
6 wealth of experience in this area and is here to answer any
7 questions that you may have on the technicality of rail
8 banks and how this fits in this scheme.

9 THE COURT: All right. Appreciate that.

10 MR. SEMINS: As far as getting into the temporary
11 takings and the nature of the taking, if we get to that
12 point, essentially the Court would have to use the
13 three-part Penn Central test for regulatory taking.

14 And under this test, you would have to look
15 at the character of the action, the economic impact of the
16 action, and the -- whether or not there has been some
17 interference with the reasonable-investment-back
18 expectations of the Plaintiffs in this case.

19 And under the facts in this case, especially
20 given that there is no occupation, physical occupation of
21 the land by a trail manager, the fact that the Plaintiffs'
22 predecessors received consideration for the right-of-way
23 however many years ago, the fact that there's a
24 Transportation Act of 1920 that preempted any
25 State-law-based expectations with respect to railroad

1 rights-of-way, and the fact that there's been no change in
2 use -- and you directed a lot of questions to counsel for
3 the United States about the burdens of trail use on the
4 serving of states. And, you know, except what we see here
5 is before this becomes a trail, we see no use that would
6 be -- what we see is less use, in fact. What we have here
7 is inactivity; less of a burden on the serving of states at
8 this point.

9 And so we would argue that it doesn't
10 raise -- doesn't satisfy the three-part Penn Central test
11 for a regulatory taking. And because there has been no
12 interference with any reasonable-investment-backed
13 expectations by dint of the issuance of the NITU by the STB.

14 THE COURT: Let me -- and I understand your
15 position on the takings question. But let me ask you this:
16 Where do I find evidence of the adoption of Pennsylvania --
17 in Pennsylvania, either legislative or judicial, of a
18 shifting public use doctrine?

19 MR. SEMINS: I am -- I am not aware of any. I
20 conducted the same search that you did, and I didn't find
21 that particular language of shifting public use --

22 THE COURT: Well, I don't mean to be too narrow by
23 "have". I'm not saying you have to find the words. But
24 where, if anywhere, do I find that Pennsylvania has adopted
25 the concept?

1 MR. SEMINS: I think I may defer to my colleague
2 here on this point.

3 THE COURT: You're about to pass the basketball,
4 to use a March Madness metaphor.

5 MS. FERSTER: Thank you. Yes, I would like to
6 address that question. My name is Andrea Ferster. I'm
7 counsel for the Rails-to-Trails Conservancy.

8 THE COURT: Keep your voice up, though. You're
9 not getting through to my court reporter. There you go.

10 MS. FERSTER: On the question you asked of where
11 you find evidence in Pennsylvania of the adoption of the
12 shifting use policy, what I would like to do is explain the
13 shifting use policy.

14 The shifting use doctrine has really never
15 been adopted as the shifting use doctrine. Where it comes
16 into play in the -- in the questions of the ownership of
17 railroad corridors is in this interpretive question that
18 counsel for the United States really focused on, which is
19 the scope of the easement. And in your questioning, you
20 really focused on when you have a document that conveys a
21 right-of-way for railroad purposes, it doesn't -- as counsel
22 says, it doesn't limit the use, but it doesn't really
23 provide any explanation to the Court of how you interpret
24 what uses are contemplated within that scope.

25 And that's where policies like the

1 Pennsylvania Rails-to-Trails Act really come into play.
2 Because it essentially, rather than being a shifting public
3 use doctrine that applies for purposes of common law, it
4 really is an interpretative aid, almost like a principle of
5 statutory construction.

6 When you are faced with this issue of what is
7 the scope of this railroad easement, and the plain language
8 of the deed doesn't answer that question -- which it
9 doesn't -- then you look to the State policy. And where the
10 State has evidence, such as strong and clear policy favoring
11 the preservation of railroad corridors through use, interim
12 use as trails, as the Pennsylvania Commonwealth --
13 Commonwealth of Pennsylvania has evidenced, then that is an
14 interpretive question that should tell the Court that this
15 deed should be given a broad scope.

16 THE COURT: So, really, it's not exactly even like
17 parole evidence, because -- it couldn't be, because the --
18 the intent of the original grantor and grantee, it seems to
19 me, is now lost in the midst of time.

20 And if you have a legislature that comes on a
21 hundred years later, they weren't parties to that original
22 agreement. If anything, they would be imposing on that
23 original agreement an afterthought that comes on a hundred
24 years down the road, wouldn't they? Do you see what I'm
25 saying?

1 MS. FERSTER: Yes. Yes, I do. But it is -- that
2 is simply that's how the Courts have applied it in the cases
3 where the Courts have really struggled with the question of
4 the scope of a railroad easement, and they found no evidence
5 in the deed. And, of course, the transaction took place a
6 hundred years ago, and there's no extrinsic evidence they
7 can point to. And the statutes authorizing the railroad are
8 equally general and unilluminating. Then that same
9 policy --

10 THE COURT: So are you saying that the
11 Pennsylvania statute should be viewed as -- as a legislative
12 pronouncement or sentiment that there exists within every
13 deed, like the deeds we're talking about here, an acceptable
14 purpose that will not trigger a reversionary interest; that
15 being you're on safe ground if you use them for trails?

16 MS. FERSTER: That's correct. And, in fact, State
17 legislatures do that all the time on other interpretive
18 issues in interpreting railroad ownership issues.

19 For example, Indiana has a legislative
20 pronouncement that says when abandonment occurs. They just
21 sliced through this --

22 THE COURT: But what happens -- that begs the
23 question, though, because here we're talking about a takings
24 claim, allegedly caused by the intricacies of the Federal
25 Rail Banking Act.

1 But if the Pennsylvania State legislature,
2 for instance, were to pass an Act that didn't simply
3 recognize the benefits of trails, similar to the Federal
4 Act, but said, by the way, we think -- we think because
5 we're all NASCAR fans in the legislature this year, that it
6 would not be an overburdening of the original easement if
7 every railroad right-of-way was converted into a NASCAR
8 track, such that they could fly up and down and -- well, you
9 still have a -- you have a pronouncement from the
10 legislature, but does that make it not a taking?

11 MS. FERSTER: But I think you have a real
12 difference here. And I think that counsel for United
13 States, I think, did a good job in explaining that
14 difference.

15 You are dealing with the scope of this --
16 this deed and the document that does have a parameter in it,
17 and the parameter is that it does have to be a
18 transportation purpose. And it should be consistent with a
19 railroad purpose, really. And so the legislature can't, by
20 slate of hand, legislative slate of hand, say, well, we're
21 going to convert these railroad easements into amusement
22 parks or some other purpose that has no ability to be a
23 railroad purpose --

24 THE COURT: So, really, the State legislature in
25 this case is really nothing more, in your view -- and I

1 don't mean to minimize it -- but nothing more than
2 circumstantial evidence, if you will, that one's original
3 interpretation of the original deed as encompassing uses
4 like this is more likely than not correct; is that right?

5 MS. FERSTER: I think Courts have used it as an
6 interpretive aid, if that's how you -- if that was your
7 question.

8 THE COURT: It was.

9 MS. FERSTER: It's an interpretive aid. It's
10 because in these situations, it's very difficult to define
11 what the scope of a railroad easement is when you have --

12 THE COURT: Would a landowner have a viable claim?
13 Would a landowner have -- and I'm not saying they otherwise
14 wouldn't. But would a landowner have a viable claim if
15 their deed in 1847 said this: And we are -- we are deeding
16 this to the railroad for railroad purposes and railroad
17 purposes only, and by railroad purposes we mean the movement
18 of railroad cars and freight trains only, to the exclusion
19 of any other horse-drawn, mechanized, or people movement --
20 now you have a tight -- not that they did that. There was
21 no reason for them to. But if you had a deed that was that
22 tightly drawn, that could be read in no other fashion, as --
23 as meaning anything other than actual railroad use, would a
24 subsequent grantor of that property 120 years down the road
25 who was in this courtroom have a viable claim?

1 MS. FERSTER: I don't know if the subsequent owner
2 would have a viable claim in this courtroom. There have
3 been, in fact, cases where State legislatures have tried to
4 take property by legislative enactment. And that would be a
5 State Court issue.

6 THE COURT: Arguably, then, depending upon the
7 specificity of the deed, if the deed is extremely specific,
8 it would not be a stretch for me to say that interim trail
9 use was an inconsistent use, would it? Because I'm bound by
10 the intent of the original parties, aren't I, if I can find
11 it clearly in the deed?

12 MS. FERSTER: Well, again, we did view this --
13 started this discussion as a question of the shifting public
14 use. So the concept does contemplate the shift.

15 THE COURT: You don't need shifting public use if
16 you have a deed that is awfully darn clear, right?

17 MS. FERSTER: That's right. You don't need that
18 doctrine if the deed is a broad transportation --

19 THE COURT: On the other hand, shifting public use
20 won't help you either, unless arguably that shifting public
21 use can -- is not excluded by the original deed, right?
22 Shifting public use has to derive in some form or fashion
23 from the four corners of the original deed, no matter how
24 unartfully drafted.

25 MS. FERSTER: That's correct. That is how the

1 concept has been developed, is the shift has always been
2 from one transportation use to another transportation use.

3 THE COURT: It is a fiction -- one could argue, it
4 is a fiction, is it not, to -- to permit a usage which may
5 only vaguely have been within the original deed, but could
6 not have been within the contemplation of the original
7 parties, because they weren't thinking a hundred years down
8 the road?

9 MS. FERSTER: Well, that's the essence of the
10 shifting public use doctrine, is that -- is that a hundred
11 years ago, for example, you were thinking of -- you possibly
12 weren't thinking of light rail. You were thinking of
13 freight railroad, or you were thinking of horse and buggy.
14 And the concept is the transportation, and the types of
15 transportation evolves over time.

16 And that under the shifting use doctrine,
17 you're not going to confine a transportation easement to the
18 use that's in vogue at the time the easement was granted,
19 simply because the grantors at that time could not
20 contemplate a future use.

21 THE COURT: All right. Thank you very much.
22 Appreciate it. Do you have anything you want to say
23 briefly?

24 MR. COHEN: Yes, Your Honor. First of all, to
25 address the Court's discussion of a stay --

1 THE COURT: Yeah, let's talk about that.

2 MR. COHEN: Plaintiffs do not oppose that either.
3 I mean, you know, I --

4 THE COURT: On the other hand -- and I'm not sure
5 I do either. But I can't stand having my cases stayed
6 inordinately and be at the mercy of some entity that is
7 other than myself, because I don't like old cases. And they
8 have a tendency to get that way. That doesn't mean we
9 couldn't revisit the issue.

10 MR. COHEN: Right. Well, all I'm suggesting, Your
11 Honor, is that we filed this case because if we -- if we sat
12 on our hands waiting until these entities who we have no
13 control over either decided to or not to enter into a trail
14 use agreement, then, you know, we could have blown the
15 statute of limitations, and we wouldn't have any claim.

16 But we have filed -- I think it does make
17 sense in many respects to give some period of time, perhaps,
18 to see if there is some fruition --

19 THE COURT: Because I have a big loophole in my
20 facts. I don't know what's going to happen. Is there any
21 way under the regulatory scheme to force a resolution of
22 this administrative thing?

23 MR. COHEN: Your Honor, I have seen on a couple of
24 occasions -- and I'm sure other counsel can verify this or
25 not -- where after multiple extensions, the STB says this is

1 the last one; no further extensions. And, in fact, I think
2 to the extent that we can -- we have standing, meaning
3 Plaintiffs and the certified class in this case --

4 THE COURT: Can't you intervene in that? Have you
5 intervened in that administrative thing?

6 MR. COHEN: Not yet. But we're -- I'm going to.
7 We're going to, Your Honor. We're going to intervene,
8 because it is prejudicing our rights in this case by their
9 inaction.

10 And the only other thing I would suggest to
11 the Court is that I think, even though the parties did brief
12 some of the deeds, we haven't briefed all of them. And if
13 part of the Court's analysis is whether or not interim trail
14 use exceeds the scope of the deeds, then I don't think it's
15 sufficient to just look at one or two as representative. It
16 may be that we need to go -- this case, unlike other cases,
17 there's not 500 deeds.

18 THE COURT: How many deeds are we talking about?

19 MR. COHEN: I would say, what, maybe 30, 40 at the
20 most. Because a lot of them are -- the ones that are
21 warranty deeds are not part of the case. The fee deeds
22 aren't part of the case. The only deeds that are really
23 pertinent to the Court are really the ones where there is an
24 easement for railroad purposes. Those deeds are probably, I
25 would say, two dozen.

1 And then we have the -- the only two
2 condemnation proceedings that we have that we were able to
3 find, there's just two of them, and those have already been
4 introduced.

5 THE COURT: But let me ask you this: If they go
6 ahead and come to a deal here in April or May or whenever,
7 and they do that, at that point in time isn't the -- isn't
8 the situation ripe for you to go to Common Pleas and try to
9 do what you can't do right now?

10 MR. COHEN: By that, you mean a quiet title
11 action?

12 THE COURT: Quiet title action. See, I guess what
13 I'm saying is this: And, you know, we're open for business
14 here all the time. And the only requirements we have is I
15 have jurisdiction and there's a case in controversy and it's
16 ripe.

17 I'm going to -- once we break here, before we
18 do, I'm going to be inclined to stay this case, even though
19 nothing would be happening except me, you know, issuing an
20 opinion here at some point. There might have to be some
21 future briefing.

22 But if what your clients are really
23 interested in is the recovery of the property, as opposed to
24 damages for a taking, aren't you on the wrong side of the
25 fence here, the judicial fence? Not that I blame you. But

1 might it -- mighten it come to pass that the final chapter
2 in this litigation isn't finished with me, but with some
3 State Court Judge?

4 MR. COHEN: That could very well be, Your Honor,
5 especially if the railroad and the trails group fail to
6 reach an agreement. At that point there will be an
7 abandonment under -- under Pennsylvania law. We can go into
8 Court of Common Pleas and file a quiet title action.

9 The more problematic case would be if they do
10 reach an agreement, and if the Court were to find that there
11 is no abandonment, then at that point --

12 THE COURT: That might collaterally estop you in
13 State Court.

14 MR. COHEN: Yes. And at that point, then, I think
15 the only remedy would be a take -- through the Tucker Act,
16 the takings claim on the ground that the interim trail use
17 exceeds the scope of the easement that was conveyed by the
18 original grantor.

19 THE COURT: All right. Take a seat. Let's just
20 talk briefly here. In terms of a stay, I'm not exactly sure
21 what I would be staying, because there's no active discovery
22 going on or anything like that. So I guess it's -- is it
23 somewhat superfluous for me to do that? What sense does it
24 make if I just wait and, you know, 60 days hence or so order
25 the parties to get back to me and report on what, if

1 anything, has occurred?

2 MR. COHEN: That's fine with Plaintiffs, Your
3 Honor.

4 MS. TARDIFF: Your Honor, I would be amenable to
5 that as well. I suggest probably 90 days. My conversation
6 with the railroad's attorney on Tuesday, he characterized it
7 as probably a matter of months. So I'd say probably two to
8 three months before --

9 THE COURT: But I will say this: If this thing
10 just keeps -- I mean, if there's no light at the end of this
11 tunnel, you know, this case gets older, my motion gets
12 older -- and I don't like old cases, I don't like old
13 motions -- then we'll have to reanalyze, you know, where
14 we -- where we are.

15 I mean, the other possibility -- and I'm not
16 suggesting it would come to this. But -- well, if it looked
17 like you were years before you were going to get a decision
18 here from the STB on this thing, or the parties, then the
19 other possibility, I suppose, would be a -- a voluntary
20 withdrawal without prejudice.

21 But I presume that the only way that you'd be
22 willing to do that would be if there was an agreement by the
23 United States or any other interested party that if and when
24 you decided to refile, there would not be a limitations
25 argument that was raised.

1 MR. COHEN: Yes, Your Honor, that would have to
2 be --

3 THE COURT: That would be your only concern,
4 wouldn't it?

5 MS. TARDIFF: Your Honor, if I could address that,
6 that does present a problem for us. I mean, we would be
7 more amenable to the stay.

8 The statute of limitations in these takings
9 cases is jurisdictional, so we don't have the ability
10 to control it or --

11 THE COURT: I understand that.

12 Now, let me ask you one other question, and
13 then we're going to break. And this is just a -- and I'm
14 going to go look at the case. How can a cause of action
15 accrue if you haven't had any damages? Conceptually. Does
16 anybody know how that can happen? Do you? Do you?

17 MS. TARDIFF: Well, I can attempt to answer. This
18 is -- this is really the precise issue that I think the
19 Federal Circuits struggled with in the Caldwell case. And
20 there's a dissenting opinion by Judge Newman in that case,
21 and I think in Barclay as well, where she says just that;
22 you don't know what the damages or the extent of the damages
23 are until this process works itself out.

24 The majority, however, was that there is
25 enough for the statute of limitations to be triggered in

1 these cases when a NITU is issued, even if you don't know,
2 you know, the extent of the possible damages.

3 THE COURT: All right. What we'll do is I'm going
4 to order -- we're going to set a status conference up, a
5 telephonic status conference in 60 days. At that point
6 we'll get you on the line, and we'll see where we're going.
7 If things have come to a resolution, fine. If not, we'll
8 probably wait a period longer and see what happens.

9 If they have, you indicated, Mr. Cohen, you
10 might want to do some additional briefing. It might be
11 appropriate that there be some supplemental motions filed at
12 that point, based upon what the lay of the land is.

13 But all that is for the future, and we'll
14 decide where we go from there.

15 All right, thank you very much.

16

17 (Hearing concluded at 3:32 p.m.)

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